No. 05-

IN THE

Supreme Court of the United States

TYRONE LEAK and ALAN DENNIS,

Petitioners,

v.

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF CORRECTIONS; JACK TERHUNE; STEVEN PINCHAK, Administrator of East Jersey State Prison; PATRICK ARVONIO; STEVEN MAGGI, Chief of Correctional Officers East Jersey State Prison; JOHN DOES 1-20,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN G. CITO
1621 Highway 27
Edison, NJ 08817
(732) 819-8777

Attorney for Petitioners

197396

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The Third Circuit affirmed the District Court of New Jersey's Order granting the employer's Motion for Summary Judgment in a case that alleges an employer with both creating and maintaining a racially hostile work environment against black Correctional Officers and also engaging in a variety of retaliatory acts in direct response to the filing of the lawsuit.

The two questions presented are:

1. In the instance of retaliation when an employee is transferred, whether the physical change of the location of one's employment constitutes a retaliatory action under the Civil Rights Laws and that such a physical change of the location is serious and tangible enough to alter an employee's terms, conditions or privileges of employment? (*See Weston v. Commonwealth of Pennsylvania*, 251 F3d 420 (3d Cir. 2001)

2. In a lawsuit alleging various Civil Rights violations, should the Court look at the totality of the circumstances when determining whether a hostile work environment and retaliatory actions by the employer exist permitting all issues to be determined by the Jury, including credibility as to what constitutes a hostile work environment?

LIST OF PARTIES

The parties below are listed in the caption other than Plaintiffs Lori Scott, David Jones, Abubakr Sadiq, William Washington, Herbert Bacon, Pierce Graham, Joy Hill, Gregory Spinner, Hatha Baraka, Joan Bates, Gerard Schenck, Russell Peterson and Michael Lane, who have settled and Plaintiffs Trevor Todd and Robert Nelson who were voluntarily dismissed early on in the litigation. The Plaintiff-Petitioners are Alan Dennis and Tyrone Leak.

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The Opinion of the United States Court of Appeals for the Third Circuit was decided on August 01, 2005, Docket No. 04-3446.

STATEMENT OF JURISDICTION

This Court's Jurisdiction is invoked under 28 U.S.C. § 1254(1). The Third Circuit's Opinion was rendered on August 01, 2005, with Judgment being on August 01, 2005, in favor of the Respondent and affirming the Judgment of the United States District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 U.S.C. §§ 1981, 1983 and 1985 and Title VII of the Civil Rights Act.

STATEMENT OF THE CASE

On March 11, 1999 Petitioners filed a Complaint in the U.S. District Court for the District of New Jersey, alleging various Civil Rights violations arising out of their employment with the State of New Jersey, Department of Corrections (NJDOC) (Complaint). An Amended Complaint was filed on October 07, 1999 by the Petitioners (Amended Complaint). Respondents-Defendants filed an Answer to the Amended Complaint on November 12, 1999. (Answer).

The Petitioners filed a Second Amended Complaint on December 18, 2000, which incorporated various acts of retaliation, which occurred after the filing of the initial Complaint. (Second Amended Complaint).

Petitioners-Plaintiffs, Alan Dennis and Tyrone Leak, are two African-Americans who were employed as Correctional Officers with the New Jersey Department of Corrections at East Jersey State Prison (hereinafter referred to as EJSP).

The Respondent-Defendant Steven Maggi was Chief of EJSP in charge of the Correctional Officers at EJSP. The Respondent-Defendant Steven Pinchak was the Administrator of EJSP who had overall supervisory responsibility at EJSP.

Both Petitioners stated that they were subjected to a hostile work environment at EJSP, along with complaints of racial discrimination, harassment and retaliation.

As set forth in the Complaint, beginning in December 1998, Petitioners became aware of an increase in racial hostilities at EJSP. Among the acts were the following:

1. Black officers charged with disciplinary violations while similarly situated white officers were either not charged or given reductions in their charges.

2. Black officers witnessing white officers assaulting and beating black inmates for no other reason than the race of the inmate.

3. Black officers, who filed grievances as to racial discrimination and/or racial harassment, did not have those grievances properly investigated.

4. Observations of racial comments on the walls in the Correctional Officer's bathrooms and lockers.

5. White officers calling inmates racial slurs, including "niggers" and "shines".

6. White officers possessing and circulating applications for membership in the KKK at EJSP.

In addition, pursuant to the Holland Consent Decree (an Order entered into by the U.S. District Court for the Third Circuit in a prior case), there exists an internal process similar to EEOC at the NJDOC as to filing complaints of such nature (known as EED Complaints). Both Petitioners filed EED Complaints as to some of the incidents arising out of the hostile work environment/retaliation existing at EJSP.

Petitioner Dennis filed seven (7) EED Complaints as follows:

1. March 27, 1999 – Petitioner's altercations with white Officers Godown and House.

2. April 01, 1999 – Incident concerning Petitioner's re-assignment of a Highway Detail.

3. April 17, 1999 – A white supervisor disconnecting Petitioner's telephone call with his wife.

4. April 18, 1999 – Petitioner's restricted access to EJSP's main facility, after he complained of retaliation at the main facility.

5. June 01, 1999 – A white officer's threats towards Petitioner.

6. June 01, 1999 – White Correctional Officers' sale of Chief Maggi T-Shirts on EJSP property.

7. June 01, 1999 – EED's investigator's improper questioning of Petitioner.

Petitioner Leak filed three (3) EED Complaints:

1. March 26, 1999 – Set-up of Petitioner by his supervisors and subsequent disciplinary action against him arising out of video taping of the Mess Hall at EJSP.

2. April 24, 1999 – Improper disciplinary charges filed against petitioner.

3. September 08, 1999 – A threat made by Sgt. Cifelli (a white supervisor) to petitioner.

In particular, as to the March 27, 1999 incident, the Petitioner Dennis was re-assigned out of the main facility at EJSP due to a verbal altercation with Officer Godown, a white officer. The disparate treatment was that the Petitioner, a black officer, was re-assigned, while the white officer was not.

The Petitioners Dennis and Leak on May 20, 1999 filed internal reports as to the selling of T-Shirts at EJSP. As per EED's investigation, Petitioners were to be transferred out of EJSP due to safety concerns, with Petitioner Dennis being transferred to Northern State Prison and Petitioner Leak being transferred to Mountainview State Prison.

White officers at EJSP sold the T-Shirts in question. The T-Shirts had on them the picture of the Chief with the caption "Support Our Leader". These T-Shirt sales occurred immediately after both Petitioners gave statements to the public at large as to racial discrimination and retaliation existing at EJSP. (See EED May 23, 1999 Report).

When Petitioners complained to EED as to these T-Shirt sales and the adverse impact that these sales were having as to racial tension at EJSP, the Petitioners, without any input on their behalf, were simply transferred out of EJSP to other facilities within the State of New Jersey.

EED issued its investigative report on this matter on May 23, 1999, which contained in its summary that the two Petitioners "are victims of a hostile work environment by virtue of the timeliness of the tee shirt sales alone." The EED report concluded that the two Petitioners have a right to a safe work environment. It is important to note that nowhere in the record is it contained that EED recommended a transfer *without* Petitioner's input.

As set forth in the EED Complaint as to an incident of March 26, 1999, the Petitioner Leak stated that he was the victim of retaliation when a video camera was pointed into his direction where he was working, as opposed to being directed towards the inmate population in the Mess Hall. Petitioner Leak was then accused, by his supervising officers, of sleeping. He was the subject of a disciplinary hearing, where he received a written reprimand. Petitioner disputed the allegations as to the supervisors. (See Appeal of Minor Disciplinary Action) (See EED Complaint).

It is a question of fact as to whether one is to believe the Petitioners' position as to the allegations contained in both the EED Complaints and Civil Complaint as to the hostile

work environment and retaliation. It is important to look at the totality of the circumstances and the resulting impact upon the Petitioners. The Trial Judge erred when he imposed his own beliefs into this litigation and made Findings of Fact as to issues to be determined by a Jury. The Opinion of the Third Circuit further narrowed what constitutes an adverse work environment and retaliatory actions by an employer.

REASON FOR GRANTING THE PETITION

The Opinion of the Third Circuit in the case *sub judice* essentially is further restriction as to what constitutes an adverse employment action under *Weston v. Pennsylvania*, 251 F.3d 420, 430 (3d Cir. 2001). The present Opinion does not take into consideration the totality of the circumstances as to the Petitioners' employment.

> To bring an actionable claim for . . . harassment because of an intimidating and offensive work environment, a plaintiff must establish 'by the totality of the circumstances, the existence of a hostile or abusive working environment. . . .

West v. Philadelphia Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995), quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990). *See also Kent v. Hendersen*, 77 F. Supp. 2d 628, 631 (E.D. Pa. 1999); *Knabe v. Boury Corp.*, 114 F.3d 407, 410 (3d Cir. 1997); *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir. 1999).

The totality of the circumstances is that Petitioners are members of a protected class in that they are African-Americans, who were subjected to a hostile work environment which ultimately led to a variety of retaliatory

actions by the Respondents. The Respondent's actions constitute adverse employment actions.

It is Petitioners' position that there was a severe pervasive harassment as to their employment, in that the Respondent was an informed employer who took no effective measures to stop the conduct and, as such, sent a message that the harassment was acceptable and that the management supports the harasser. (*Cf.*, *Blakey v. Continental Airlines, Inc.*, 741 A.2d 94, 164 N.J. 28 (2000)).

The Court in *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001), referred to a number of cases in which one must look at the totality of events:

> [A] discrimination analysis must concentrate not on individual incidents, but on the overall scenario. *Durham Life Ins. Co. v. Evens*, 166 F.3d 139, 149 (3rd Cir. 1999) (quotations omitted); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) ("Whether an environment is 'hostile' . . . can be determined only by looking at all the circumstances."). Title VII applies to both "facially neutral mistreatment . . . [and] overt [ethic] discrimination . . . [which] in sum constitute [ ] the hostile work environment." *Id.* at 148; [FN6] See also, *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-84 (3d Cir.) (discussing the increased sophistication of modern violators, the obligation of courts to be "increasingly vigilant" against subtle forms of discrimination, and the importance of allowing plaintiff to prove discrimination indirectly: "[i]n

> light of the suspicious remarks [arguably racial slurs] . . . , a reasonable jury could interpret [facially neutral] behavior as part of a complex tapestry of discrimination").

A review by the Supreme Court is warranted since the Third Circuit did not look at the totality of the circumstances when it determined that Petitioners were not subjected to an adverse employment action by the Respondents. This Opinion of the Third Circuit removes the analysis of totality of the circumstances from claims alleging a hostile work environment and retaliatory conduct by an employer.

As set forth in the Complaint, Petitioners witnessed various incidents of racial discrimination and hostile work environment. When they reported these incidents, they were subjected to retaliatory action by Respondents.

One such retaliatory action was the involuntary transfer of the Petitioners from EJSP to other facilities within the State, when Petitioners filed EED Complaints as to the T-Shirt sales at EJSP.

The language of *Robinson v. City of Pittsburg*, 120 F.3d 1286, 1300 (3d Cir. 1997), cited by the Third Circuit in its Opinion, was that conduct by an employer qualifies as an adverse employment action only if it is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." The Third Circuit in its Opinion relied upon *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996), in that purely lateral transfers do not rise to the level of a materially adverse employment action.

The Third Circuit failed to take into account that this was *not* a purely lateral transfer. Petitioners were relocated to other locations within the State. Petitioner Dennis was transferred from EJSP in Woodbridge, New Jersey to Northern State Prison in Newark, New Jersey. Petitioner Leak was transferred to Mountainview Prison in Annadale, New Jersey. The distances are 18 to 39 miles, respectively, from EJSP.

The location of the transfer is essential as to whether it is a lateral transfer. This is a material change in the terms of one's employment. For many individuals, location of one's employment is more important than pay or rank.

The Opinion of the Court in this matter, further erodes what constitutes an adverse employment action and retaliatory conduct by an employer, and the criteria of what is serious and tangible enough under *Robinson* and *Williams*. Essentially, the only criteria that remains is the impact upon an employee's compensation. This Opinion creates a new and restrictive standard as to what qualifies as an adverse employment action, removing "conditions and privileges" of employment as factors which constitute an adverse employment action.

In another incident as to retaliatory conduct by Respondents, Petitioner Leak stated that he was the victim of retaliation when a video camera was pointed into his direction in the Mess Hall where he was working at EJSP, as opposed to being directed towards the inmate population in the Mess Hall. Petitioner Leak was then accused, by his supervising officers, of sleeping. He was then the subject of a disciplinary hearing, where he received a written reprimand but not as to the allegation of sleeping but as to improper

use of a security key. (See EED Complaint). The Trial Court held that as a matter of law that the Petitioner was properly disciplined for his failure to be vigilant on the job. The Third Circuit improperly erred when it affirmed the Trial Court's dismissal of this claim.

Pursuant to *Weston, supra*, the Petitioner met the required standard of an adverse work environment in that the Petitioner was in fact the subject of discipline by the Defendants. It is for the Trier of Fact to determine the underlining facts as to whether the Petitioner was properly disciplined and whether or not Petitioner was vigilant on the job.

The Court's Opinion virtually removes the totality of the circumstances criteria and permits a Trial Judge to make findings of fact as to all issues including credibility as to this retaliatory disciplinary action. The Third Circuit has now adopted a new standard as to credibility in Civil Rights litigation with the Trial Judge now deciding credibility issues. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are Jury functions, not those of a judge, whether he is ruling on a Motion for Summary Judgement or for a direct verdict.); *see also Rocco v. New Jersey Transit Rail Operations, Inc.*, 749 A.2d 868, 330 N.J. Super. 320, 334; *Reisman v. Great American Recreation, Inc.*, 628 A.2d 801, 266 N.J. Super. 87, 99 (App. Div. 1993), *quoting Nobero Co. v. Ferro Trucking, Inc.*, 258 A.2d 713, 107 N.J. Super. 394, 404; *D'Amato by McPherson v. D'Amato*, 701 A.2d 970, 305 N.J. Super. 109, 115 (App. Div. 1997).

As to the pendent claims, the Third Circuit affirmed the Trial Judge's misapplication of the State law set forth in *Shepherd v. Hunterdon Developmental Center*, 765 A.2d 217, 336 N.J. Super. 395 (App. Div. 2001). The Court in *Shepherd*, actually held that it was a material issue of fact as to whether the supervisors/employer created a hostile work environment, as follows:

> It is the harassing conduct that must be severe or pervasive, not its effect on the employee or the work environment. *Lehmann, supra*, 132 N.J. at 606, 626 A.2d 445. The conduct must be severe enough to make a reasonable person in the protected group believe that the conditions of work have been altered and that the environment is hostile or abusive. *Taylor v. Metzger*, 152 N.J. 490, 506, 706 A.2d 685.
>
> Moreover, by using the disjunctive requirement of "severe or pervasive," *Lehmann* recognized that many plaintiffs claiming a hostile work environment allege numerous incidents that, if considered individually, would not be sufficiently severe to make the work environment intimidating or hostile. *Lehmenn v. Toys 'R' Us*, supra, 132 N.J. at 607, 626 A.2d 445. The severity or seriousness of the conduct may vary inversely with the pervasiveness or frequency of the conduct, and, therefore, the Court "must consider the cumulative effect of the various incidents." *Ibid.*

In *Shepherd*, the Court held that it must accept Plaintiffs' allegations as true for the purpose of the Summary Judgment Motion and when viewed in that light, Plaintiffs have established a factual dispute as to a hostile work environment. *Id.* at 418.

It is respectfully submitted that the allegations of the Petitioners should have been permitted to go to the Jury and have not dismissed the matter without the totality of the circumstances analysis. The Jury would have been told to assess whether Petitioners made a persuasive showing of unlawful discrimination and that it may use its' disbelief of Respondent's explanation in making that determination, *i.e.*, that in essence the Jury is to make considered judgment on the ultimate question based on all evidence before it without assistance of presumption. *Mattiello v. Grand Union Co.*, 754 A.2d 563, 333 N.J. Super. 12 (App. Div. 2000), *cert. denied*, 762 A.2d 658, 165 N.J. 677 (2000).

As previously stated, the Opinion of the Third Circuit has now resulted in employees having less rights than the standard set forth in *Weston* and *West*, and the companion State of New Jersey Court standard enumerated in *Shepherd*. The Third Circuit Opinion sets the standard that one's rights have been violated only in circumstances that have a direct monetary impact on the employee. Employers will be able to use disciplinary hearings as a pre-text to conduct retaliatory acts upon an employee and so long as it does not impact one's monetary position, those actions do not constitute an adverse employment action.

Further, the Third Circuit Opinion permits an employer to retaliate against an employee, by way of transferring the employee from one location to another, so long as the salary remains the same. As set forth previously, the location of one's employment is often more important than the salary one receives.

A review by this Court is warranted to return the standard to be not only monetary impact on an employee, but also that location of one's employment, is a significant condition or privilege of one's employment.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

JOHN G. CITO
1621 Highway 27
Edison, NJ 08817
(732) 819-8777

Attorney for Petitioners

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 1, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-3446

LORI SCOTT; DAVID JONES; ALAN DENNIS; ABUBAKR SADIQ; TYRONE LEAK; WILLIAM WASHINGTON; HERBERT BACON; PIERCE GRAHAM; JOY HILL; GREGORY SPINNER; HATHA BARAKA; JOAN BATES; TREVOR TODD; ROBERT NELSON; GERARD SCHENCK; RUSSELL PETERSON; MICHAEL LANE

v.

STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF CORRECTIONS; JACK TERHUNE; STEVEN PINCHAK, Administrator of East Jersey State Prison; PATRICK ARVONIO; STEVEN MAGGI, Chief of Correctional Officers East Jersey State Prison; JOHN DOES 1-20

Tyrone Leak,
Alan Dennis,

Appellants.

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
D.C. Civil No. 99-cv-01099
District Judge: The Honorable William J. Martini

Submitted Under Third Circuit LAR 34.1(a)
July 1, 2005

Before: ROTH, RENDELL, and BARRY, Circuit Judges.

(Opinion Filed: August 1, 2005)

OPINION

BARRY, *Circuit Judge*

At all times relevant to this litigation, plaintiffs Tyrone Leak ("Leak") and Alan Dennis ("Dennis") were employed as corrections officers at the East Jersey State Prison ("EJSP"), a facility operated by the New Jersey Department of Corrections ("DOC").[1] Leak and Dennis allege that the State of New Jersey and the DOC, along with various individual defendants, created and maintained a racially hostile work environment, discriminated against black corrections officers, and engaged in a variety of retaliatory acts in direct response to the filing of this lawsuit. They sought redress pursuant to Title VII of the Civil Rights Act of 1964 and New Jersey's Law Against Discrimination ("LAD"), among other federal and state statutes.

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1. The remaining plaintiffs settled their claims and are no longer parties to this litigation.

Appendix A

Leak and Dennis now appeal from orders of the District Court dated May 24, 2004 and July 26, 2004, which granted summary judgment in favor of defendants and denied plaintiffs' motion for reconsideration, respectively. For the reasons set forth below, both orders will be affirmed.

I.

Because we write only for the parties, we will limit our discussion of the facts to those which are pertinent to our analysis. Central to the complaint plaintiffs filed in the District Court is the allegation that defendant Steven Maggi, the Chief of Correctional Officers at EJSP ("Chief Maggi"), maintained a racially-inflammatory display on his office wall. This display consisted of a small doll, a straw hat, and a miniature wooden coffin, beneath which was taped a handwritten note reading "NO NIGGERS ALLOWED." Photographs of the display, taken by Leak, are included in the record. Leak and Dennis do not allege that Chief Maggi himself either arranged the items or wrote the note. They do, however, claim that Chief Maggi was aware of the display, and that neither he nor any other supervisor at EJSP took steps to remove it from the wall before this lawsuit was filed.

Defendants admit that the doll, hat, and coffin were located in Chief Maggi's office; indeed, the parties stipulated that all three of the items were gifts presented to Chief Maggi on various occasions by minority corrections officers and inmates. Defendants contend, however, that Leak manufactured the offensive display by rearranging the items and grouping them alongside the note, which according to defendants was itself a fabrication. He then photographed his handiwork.

Appendix A

Plaintiffs' remaining claims arise from events which occurred after they commenced this lawsuit. In the months following the filing of their complaint, both Leak and Dennis filed a series of charges with the Equal Employment Division ("EED"), an investigative arm of the DOC responsible for combating discriminatory behavior.[2] All of these charges arose from incidents which allegedly occurred at EJSP or involved EJSP officers, and all were investigated by EED. EED found that there was insufficient evidence to support the charges. Thereafter, Leak and Dennis amended their complaint to allege that the incidents themselves, as well as EED's repeated findings that their charges were unsubstantiated, represented a concerted effort to target them in retaliation for filing this lawsuit.

II.

A. *Summary Judgment Standard*

Our review of a grant of summary judgment is plenary, and we apply the same legal standard as the district court. *Saldana v. Kmart Corp.*, 260 F.3d 228, 231 (3d Cir.2001). Summary judgment is appropriate when there exists "no genuine issue of material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A factual dispute is deemed genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

2. Plaintiffs filed their complaint on March 11, 1999. Between March 27 and June 1, 1999, Dennis filed seven charges with EED. Between March 26 and September 8, 1999, Leak filed three such charges.

242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). At this stage of the proceedings, we must view the record in the light most favorable to Leak and Dennis, and draw from the record any reasonable inferences which support their claims. *Debiec v. Cabot Corp.*, 352 F.3d 117, 128 n. 3 (3d Cir.2003). Leak and Dennis may not, however, survive summary judgment by relying on the allegations contained in their pleadings; instead, they are required to demonstrate, through affidavits or other reliable evidence, a sufficient factual basis to present a genuine issue for trial. *Saldana,* 260 F.3d at 232.

B. Hostile Work Environment Claim

Leak and Dennis claim that the display in Chief Maggi's office generated an actionable hostile work environment within the meaning of Title VII.[3] While we have no doubt that such a patently offensive display could be actionable under different circumstances, we agree with the District Court that "Leak and Dennis have failed to credibly contest Defendants' overt accusations of fraud," *Scott v. New Jersey,* No. 99-1099, slip op. at 17 (D.N.J. May 24, 2004), and we will affirm on that basis.

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3. In order for an employer to be liable under a hostile work environment theory, a Title VII plaintiff must prove that: (1) he or she suffered intentional discrimination because of his or her race or sex; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would have detrimentally affected a reasonable person of the same race or sex, in like position; and (5) a basis for respondeat superior liability. *See Kunin v. Sears Roebuck Co.,* 175 F.3d 289, 293 (3d Cir.1999) (citing *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3d Cir.1990)).

Appendix A

In support of their motion for summary judgment, defendants submitted the deposition testimony of two corrections officers at EJSP, each of whom claims that Leak fabricated, and then photographed, the display. Officer Victor Moore witnessed Leak writing a note which said "niggers not allowed" while inside Chief Maggi's office, and then photographing it alongside the doll, hat, and coffin. Officer Barry Jackson testified that, after arranging the items on Chief Maggi's wall, he saw Leak take a note containing the same racial epithet out of his pocket and add it to the display. Leak later told Jackson that he had photographed the display and that his goal was to generate evidence to support a planned lawsuit:

> I stepped to the door of the chief's office and [Leak] gave me the story. Look, I got an idea for this million dollar lawsuit. I'm sitting there like, what are you talking about. And he takes—the chief had, you know, a couple of things in his office that, you know, various people gave him over the course of the years or whatever. And he arranged a couple of things in this coffin. He had a coffin. He had a braid, a doll and he arranged them in a coffin. I'm saying like, man, what are you doing. And he said, this is racism in here. Because at the time, you know, there was a lot of little things going around, people saying racial stuff and I guess he was just trying to fly with the whole scenario. He took a letter out of his pocket, no Niggers allowed. Then when he did that, he put it up against the wall. He said, I am going to

> take a picture of this and I am going to show the whole scenario like this and I am going to take it to my lawyer.

A731-32 (Jackson Dep.).[4]

Neither Leak nor Dennis submitted affidavits denying these highly specific, and very serious, allegations. Remarkably, they nevertheless contend that whether or not they fabricated the racist display is an issue of credibility, which should have been left to the jury. We are not persuaded. In the absence of a sworn denial, there is no genuine issue of fact and utterly no basis to even suggest that any reasonable jury would reject the testimony of Moore and Jackson and return a verdict for Leak and Dennis on this claim. Accordingly, summary judgment was appropriately granted.

C. Retaliation Claims

To establish a prima facie case of retaliation under either Title VII or LAD, N.J. Stat. Ann. § 10:5-12(d) (2005), a plaintiff must show that: (1) he or she engaged in a protected employee activity; (2) he or she suffered an adverse employment actions; and (3) a causal link exists between the protected activity and the adverse action. *Weston v. Pennsylvania,* 251 F.3d 420, 430 (3d Cir.2001); *Romano v. Brown & Williamson Tobacco Corp.,* 284 N.J.Super. 543, 665 A.2d 1139, 1142 (1995). Conduct by an employer qualifies as an adverse employment action only if it is

4. According to Jackson, Leak subsequently induced him to accompany Leak to an attorney's office where Leak and the attorney reviewed the photographs and discussed the potential lawsuit.

"serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges or employment." *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1300 (3d Cir.1997). Oral reprimands and derogatory comments do not qualify as adverse employment actions for purposes of establishing a prima facie case of retaliation. *Id.* at 1301. Similarly, "a purely lateral transfer, that is, a transfer that does not involve a demotion in form or substance, cannot rise to the level of a materially adverse employment action." *Williams v. Bristol-Myers Squibb Co.,* 85 F.3d 270, 274 (7th Cir.1996), *cited with approval in Robinson,* 120 F.3d at 1301.

We agree with the District Court that neither Leak nor Dennis alleged a cognizable adverse employment action. While it is undisputed that they were transferred from EJSP to Mountainview Youth Correctional Facility and Northern State Prison, respectively, on May 24, 1999, there is no evidence that these transfers resulted in a reduction in pay or status for either man. *Cf. Williams,* 85 F.3d at 274 (explaining that a lateral transfer involving "no reduction in pay and no more than a minor change in working conditions" does not qualify as adverse employment action). In fact, the transfer order itself made clear that Leak and Dennis were to "remain on their same shift with the same days off" and left open the possibility that they could return to EJSP once the investigation into their charges was completed. A665. Accordingly, we find as a matter of law that the transfers were not adverse employment actions.[5] Each of the other

5. Because these transfers were recommended by the EED investigator who handled plaintiffs' series of charges, A664 (Cont'd)

adverse actions proffered by Leak and Dennis fails for similar reasons. We will, therefore, affirm the grant of summary judgment on the retaliation claims.

D. Remaining Claims

For substantially the reasons set forth in the District Court's opinion, we conclude without further discussion that summary judgment was appropriately granted on plaintiffs' remaining claims.

III.

The District Court's order of May 24, 2004 will be affirmed. In addition, because plaintiffs have failed to address the denial of their motion for reconsideration in their submissions to us, the District Court's order of July 26, 2004 will also be affirmed.

(Cont'd)

(observing that Dennis and Leak "deserve reassignment based upon their fears and perceptions" and that "transfer is warranted"), we also find the requisite causal connection to be lacking. That is, even if the transfers *were* adverse employment actions, as plaintiffs claim, a reasonable jury would be compelled to conclude that they were the legitimate result of the EED investigative process, as opposed to illegitimate retaliation for plaintiffs' filing of this lawsuit.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JULY 26, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No: 99-1099 (WJM)

OPINION & ORDER

HON. WILLIAM J. MARTINI

LORI SCOTT, DAVID JONES, ALAN DENNIS, TYRONE LEAK, WILLIAM WASHINGTON, HERBERT BACON, PIERCE GRAHAM, JOY HILL, GREGORY SPINNER, HATHA BARAKA, JOAN BATES, GERARD SCHENCK, RUSSELL PETERSON, and MICHAEL LANE,

Plaintiffs,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF CORRECTIONS, JACK TERHUNE, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF CORRECTIONS, STEVEN PINCHAK, ADMINISTRATOR OF THE EAST JERSEY STATE PRISON, PATRICK ARVONIO, STEVEN MAGGI, CHIEF OF CORRECTIONAL OFFICERS EAST JERSEY STATE PRISON, and JOHN DOES 1-20,

Defendants.

Appendix B

MARTINI, U.S.D.J.

This matter comes before the Court upon Plaintiffs Tyrone Leak ("Leak") and Alan Dennis ("Dennis") (collectively "Plaintiffs") Motion for Reconsideration pursuant to L.Civ.R. 7.1(g), of this Court's Opinion and Order of May 24, 2004, granting Defendants State of New Jersey, the Department of Corrections ("State Defendants"), and various individual defendants (collectively "Defendants") Motion for Summary Judgment.

Pursuant to Fed. R. Civ. P. 78, this Court has considered the written submissions by the Plaintiff and the Defendant, and its prior decision dismissing this action; and

It appearing that a Motion for Reconsideration (termed by Plaintiffs as a Motion for Reargument[1]) is governed by Local Civil Rule 7.1(g); and it appearing Local Civil Rule 7.1(g) provides for the reargument of an order if the motion for the same is filed within 10 days after entry of the disputed Order; and

It further appearing that the purpose of a motion for reconsideration is "to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985); *See also, Shoenfeld Asset Mgt. v. Cendent Corp.,* 161 F. Supp. 2d 349,

1. Local Civil Rule 7.1, comment 6(a); See, e.g., *Hernand v. Beeler,* 129 F. Supp. 2d 698, 701 (D.N.J. 2001) (noting that the terms reargument and reconsideration are interchangeably used and that Rule 7.1(g) governs both).

352 (D.N.J. 2001), *Yurecko v. Port Authority Trans-Hudson*, 2003 WL 22001196, at * 2 (D.N.J. Aug. 18, 2003); and

It further appearing that the Rule requires that the moving party set forth "concisely the matters or controlling decision which counsel believes the [Court] has overlooked." *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990); and

It further appearing that "a party seeking reconsideration must show more than a disagreement with the Court's decision." *Id.*; and

It further appearing that "a mere recapitulation of the cases and arguments considered by the Court before rendering its original decision" does not warrant reargument. *Elizabethtown Water Co. v. Hartford Casualty Ins. Co.*, 18 F. Supp. 2d 464, 466 (D.N.J. 1998) (quoting *Carteret Savings Bank F.A. v. Shushan*, 721 F. Supp. 705, 709 (D.N.J. 1989)); and

It further appearing that a court may grant a properly filed motion for reconsideration for one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice. *Database America v. Bellsouth Advertising & Publ' g.*, 825 F. Supp. 1216, 1220 (D.N.J. 1993) (citing *Weyerhaeuser Corp. v. Koppers Co.*, 771 F. Supp. 1406, 1419 (D. Md. 1991)); and

It further appearing that Plaintiffs' argument that this court overlooked legal and factual principles regarding:

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(1) Dennis' restriction of access to the main facility; (2) Dennis' involuntary transfer from East Jersey State Prison; (3) Leak's discipline as to the video cameras in the Mess Hall incident; (4) Leak's involuntary transfer from East Jersey State Prison; and Plaintiffs' claims as related to Defendant Chief Steven Maggi's Office is incorrect as this Court considered and rejected *all* of Plaintiffs' arguments reasserted in their Motion for Reconsideration;

It further appearing that a motion for reconsideration is improper when it is used "to ask the Court to rethink what it had already thought through — rightly or wrongly." *Ciba-Geigy Corporation v. Alza Corporation,* 1993 WL 90412, *1 (D.N.J. March 25, 1993); *Oritani Say. & Loan v. Fidelity & Deposit Co.,* 744 F. Supp. 1311, 1314 (D.N.J. 1990), rev'd on other grounds, 989 F.2d 635 (3d Cir. 1993); and

It further appearing that because reconsideration of a judgment after its entry is an extraordinary remedy, motions to reconsider or reargue are granted "very sparingly." *Maldonado v. Lucca,* 636 F. Supp. 621, 630 (D.N.J. 1986); and

It further appearing that a Motion for Reconsideration will be granted only where "dispositive factual matters or controlling decisions of law were overlooked by the Court in reaching its prior decision," and if the overlooked matter "might reasonably have resulted in a different conclusion [by the court.]" *United States v. Compaction Systems Corp.,* 88 F.Supp.2d 339, 345-346 (D.N.J. 1999); and

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It further appearing that Plaintiffs have not demonstrated that an intervening change in the controlling law has occurred, nor that evidence not previously available has become available, nor that it is necessary to correct a clear error of law or prevent manifest injustice; and

IT IS, on this 26th day of July, 2004,

ORDERED THAT Plaintiffs Tyrone Leak ("Leak") and Alan Dennis ("Dennis") (collectively "Plaintiffs") Motion for Reconsideration pursuant to L.Civ.R. 7.1(g), of this Court's Opinion and Order of May 24, 2004, granting Defendants State of New Jersey, the Department of Corrections ("State Defendants"), and various individual defendants (collectively "Defendants") Motion for Summary Judgment is **DENIED**; and it is further

ORDERED THAT the above-captioned matter is **CLOSED.**

s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

cc: The Honorable Ronald J. Hedges, U.S.M.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MAY 24, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No: 99-1099
(WJM)

OPINION

HON. WILLIAM J. MARTINI

LORI SCOTT, DAVID JONES, ALAN DENNIS, TYRONE LEAK, WILLIAM WASHINGTON, HERBERT BACON, PIERCE GRAHAM, JOY HILL, GREGORY SPINNER, HATHA BARAKA, JOAN BATES, GERARD SCHENCK, RUSSELL PETERSON, and MICHAEL LANE,

Plaintiffs,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF CORRECTIONS, JACK TERHUNE, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF CORRECTIONS, STEVEN PINCHAK, ADMINISTRATOR OF THE EAST JERSEY STATE PRISON, PATRICK ARVONIO, STEVEN MAGGI, CHIEF OF CORRECTIONAL OFFICERS EAST JERSEY STATE PRISON, and JOHN DOES 1-20,

Defendants.

Appendix C

MARTINI, U.S.D.J.

In March 1999, the above-captioned Plaintiffs, including Alan Dennis ("Dennis") and Tyrone Leak ("Leak") brought suit against Defendants, State of New Jersey, the Department of Corrections ("State Defendants"), and various individual defendants (collectively "Defendants"), for claims sounding in racial discrimination, harassment, retaliation, and being in violation of the terms of a Consent Decree[1] resulting from

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1. Since May 10, 1996, a Consent Decree resulting from a resolution of allegations made in the case of *Holland v. New Jersey Department of Corrections*, 246 F.3d 267 (3d Cir. 2001), has dictated the various obligations the State of New Jersey and/or the DOC were required to follow with regard to allegations of racial discrimination, harassment or retaliation. (Def. SOMF, at ¶ 3).

Relevantly, the Decree state that: the State Defendants and their employees shall not engage in any act or practice that unlawfully discriminates against any DOC employee on the basis of race and gender, including but not limited to creating, maintaining, supporting, or condoning a racially or sexually hostile work environment; (*Id.*, at ¶ 4); and that the State Defendants and their employees shall not retaliate against any person because that person has opposed alleged discriminatory or retaliatory policies or practices within the DOC, or because of race or sex, or because of that person's participation or cooperation in the initiation, investigation, litigation, or administration of the alleged discriminatory or retaliatory actions. *Id.*, at ¶ 5).

Also, the Decree affords all employees the right to file a complaint of discrimination with the EED; (*Id.*, at ¶ 7); requires that the EED be staffed by a supervisor and investigators; (*Id.*, at ¶ 8); and requires that the EED complete investigations and issue findings

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a decision in *Holland v. N.J. Dept. of Corr.* This Court has been advised that this matter has been largely settled, and Alan Dennis ("Dennis") and Tyrone Leak ("Leak"), are the sole remaining Plaintiffs in this litigation.

Specifically, Plaintiffs Dennis and Leak have sued for relief under: Title VII of the Civil Rights Act and 42 U.S.C. § 1981 (Count I); 42 U.S.C. § 1983 (Count II); 42 U.S.C. § 1985 (Count III); the New Jersey Constitution (Count IV); the New Jersey Law Against Discrimination ("NJLAD") (Counts V and VII); the New Jersey Conscientious Employee Protection Act ("CEPA") (Count VI); intentional and negligent infliction of emotional distress (Counts XIII and XV); violations of public policy (Count XIV); and tort of outrage (Count XVI). Defendants now move for Summary Judgment as to all of Dennis and Leak's claims. For the reasons detailed herein, Defendants' Motion for Summary Judgment is **GRANTED**, and Plaintiffs Dennis and Leak's Complaint is **DISMISSED WITH PREJUDICE** in its entirety.

BACKGROUND

During all times relevant to the herein litigation, Plaintiffs Dennis and Leak worked at the East Jersey State Prison ("EJSP"), a correctional facility operated by the New

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on complaints of discrimination within forty-five (45) days of receipt of complaints, and if a finding cannot be issued in this time period, an explanation shall be given to class counsel and the United States. (*Id.*, at ¶ 10).

Jersey Department of Corrections ("DOC") located in Rahway, New Jersey. (Def. Statement of Material Facts ("SOMF"), at ¶ 1). Dennis has been employed by the DOC from 1993 to present, and Leak was employed by the DOC from 1989 to 2000. (Pl. SOMF, at ¶¶ 1-2). Defendant Steven Maggi ("Maggi"), was Chief of EJSP, in charge of custodial personnel at the facility, including Plaintiffs Dennis and Leak. (Def. SOMF, at ¶ 2). Defendant Steven Pinchak ("Pinchak") was the Administrator of EJSP, who had overall supervisory responsibility for the facility. (*Id.*).

Dennis and Leak's various allegations against the State Defendants can be distilled into two types of claims. First, Plaintiffs Dennis and Leak allege that they were subject to a hostile work environment in violation of Title VII, NJLAD, and § 1981 because of a racially offensive sign/arrangement allegedly witnessed in Chief Maggi's office, and because of Defendants' failure to adequately address Plaintiffs' complaints of discrimination, harassment, and retaliation in the workplace.

Second, Dennis and Leak claim that upon filing their lawsuit against the State Defendants and other individuals in 1999, they were subject to retaliation and harassment by Defendants, and further race discrimination by in violation of Title VII, NJLAD, and CEPA. Under the retaliation theory, Dennis and Leak also pray for relief under 42 U.S.C. §§ 1981, 1983, and 1985 for violations of their First Amendment, Equal Protection and Due Process rights under the United States Constitution, and relief for violations of Art. 1, § 1 (Free Speech clause), and § 6 (Due Process and Equal Protection clauses) of the New Jersey Constitution. Lastly,

based upon Defendants' alleged conduct, Dennis and Leak have filed state-based common law claims of intentional and negligent infliction of emotional distress, the tort of "outrage", and the violation of public policy.

This Court shall detail only those salient facts underlying Dennis and Leak's race discrimination, hostile work environment, and retaliation claims against Defendants as it appears that those facts form the basis of all of their remaining counts.

1. The Racially Offensive Arrangement/Sign Allegedly Witnessed in Chief Maggi's Office.

The following allegation forms the catalyst for Dennis and Leak's race discrimination, harassment and retaliation claims. In or around December 1997, there were four items in Chief Maggi's office, which Dennis and Leak contend were racially offensive: a straw hat, a small doll, a miniature wooden coffin, and a piece of paper with the handwritten words "NO NIGGERS ALLOWED." (*Id.*, at ¶ 70). Leak has presented photographs which he alleges he personally took of Maggi's office in or around December, 1997, in the presence of Dennis, and over the course of three days/ occasions. (*Id.*, at ¶ 72). The photographs display the hat, doll and coffin together, and the racially offensive sign taped on the wall next to the three objects. (*Id.*)

Dennis and Leak never directly assert that Maggi placed the racially offensive sign or arrangement. Instead, they allege that Maggi permitted an open-door policy for his office and did not monitor what items were placed on his office walls.

(Pl. SOMF, at ¶ 11). Thus, Dennis and Leak assert that anyone could have had the opportunity to place the racially offensive sign on the wall. (*Id.*) Furthermore, Dennis and Leak claim that EJSP officials would enter Maggi's office to discuss matters with him, but no one requested Maggi to remove the racially offensive items. (*Id.* at ¶ 6-7). The racially offensive items would allegedly appear and disappear over time. (*Id.*, at ¶ 13). Dennis and Leak stated that the racially offensive sign and arrangement, and Maggi's failure to remove same constituted a hostile work environment. (*Id.*, at ¶ 14).

Defendants respond that Maggi neither had the racially offensive sign in his office, nor had the doll next to the hat or coffin in his office. (Def. SOMF, at ¶¶ 73-74). Defendants further explain that the hat, doll, and coffin were gifts to Maggi from minority officers and inmates. (*Id.*, at ¶ 70). In fact, Defendants allege that Leak took advantage of Maggi's open office, specifically arranged the hat, coffin doll, a braid of hair, wrote the racially offensive sign, and photographed the scene to make it appear offensive. (*Id.*, at ¶¶ 73-74).

Defendants offer testimony by minority Officer Barry Jackson, who witnessed Leak arranging the objects in Maggi's office, and heard Leak state that he would take photographs of the allegedly doctored scene to a lawyer for a million dollar lawsuit. (*Id.*, at ¶ 74). Officer Jackson also testified that Leak attempted to induce him into joining the million dollar lawsuit. (*Id.*, at ¶ 76). Officer Jackson also allegedly saw Leak take the racially offensive sign out of his pocket and unfold it. (*Id.*, at ¶ 74). Lastly, Defendants also

offer testimony of Officer Moore, who saw Leak actually hand-write the racially offensive sign, and place it on the wall. (*Id.*)

Interestingly, Leak cannot recall the identity of the store where he had the photographs developed. (*Id.*, at ¶ 75) Also, despite the fact that the photographs were taken in December 1997, Dennis and Leak never mentioned the racially offensive arrangement to Maggi, and never made a complaint to the EED concerning their allegations relating to Maggi's office. (*Id.*, at ¶ 79). It is undisputed that Dennis and Leak first complained about the photographs of the racially offensive arrangement in this lawsuit, which was filed in March, 1999. (*Id.*) This failure to file internal complaints is especially notable because, as noted below, both Plaintiffs made frequent use of the EED grievance procedures.

Upon filing the suit in 1999, Dennis and Leak also claimed that they were subjected to retaliation and race discrimination by Defendants in the form of daily harassment, disciplinary charges, inept and biased EED investigations, and transfers to and from the EJSP facility.

2. Plaintiff Dennis' Race Discrimination, Harassment, and Retaliation Claims.

During all times relevant to this litigation, Dennis filed a total of seven (7) complaints with the EED. (Def. SOMF, at ¶ 21). Dennis claims that the incidents alleged in the following complaints, and the failure of the EED to find any probable cause for any of said complaints are a continuing pattern of race discrimination, harassment, and retaliation

against him for filing the herein action. It is undisputed that Dennis did not lose any compensation or benefits as a result of the alleged acts and/or complaints.

(a) *Dennis' Alleged Altercations With Officers Godown and House.*

Dennis' first EED complaint was filed on March 27, 1999, wherein he alleged that EJSP officials falsely accused him, Leak, and Corrections Officer Kenneth Scott, of threatening Officer Godown in a hallway at the EJSP on or around March 19, 1999. (Def. SOMF, at ¶ 22). On that same day, Officer Lori Scott, Officer Kenneth Scott's wife, had alleged that Officer Godown bumped into her. (a) This led to what appears to be a heated discussion between Officers Kenneth Scott, Dennis, Leak, and Godown. (*Id.*)

Upon notification of the incident, Lieutenant Robert Miller and Captain Harold Robinson ordered Dennis, Leak, and Officers Scott and Godown to write a report explaining the incident. (*Id.*, at ¶ 23). Dennis claims that the accusation (threatening Officer Godown), and the directive by Lt. Miller and Capt. Robinson to him (to write a report) constituted race discrimination, harassment, and retaliation for filing his lawsuit against Defendants.

Dennis also claims that later on the same day, when Dennis' arm accidentally brushed against Officer House's helmet (while walking), Lt. Miller allegedly told Officer Christopher House to write a report claiming that Dennis assaulted House. (*Id.*, at ¶ 26). Allegedly, when House refused, Lt. Miller wrote up a report complaining of Dennis'

assault on House. (*Id.*) Dennis contends that Lt. Miller's actions were again discriminatory and harassing, and taken in retaliation for Dennis pursuit of legal action. (*Id.*)

Neither Dennis nor Leak were disciplined in connection with the Godown or House incidents. (*Id.*, at ¶ 29). The EED found that Lieutenant Miller and Captain Robinson acted for legitimate reasons in requiring Dennis to file an operations report and not for any purpose to retaliate, discriminate against, or to harass Dennis on the basis of his race. (*Id.*, at ¶ 30). As to the House incident, the EED determined Dennis' allegation against Lt. Miller to be unsubstantiated, as Officer House corroborated that he was not directed to write a report indicating that Dennis assaulted House. (*Id.*, at ¶ 30).

(b) *Sergeant Tartza's Order to Dennis to Leave An Assigned Highway Detail.*

Dennis filed his second EED complaint on or about April 1, 1999. (*Id.*, at ¶ 32). Dennis stated that he was scheduled to work on highway detail at the Marlboro Camp, for which he drove forty miles, only to be ordered to leave the Camp by Sergeant Tartza, and report to duty at the EJSP main facility in Rahway. (*Id.*) Dennis claimed that the extra driving was intentionally thrust upon him as harassment, discrimination, and retaliation for filing his lawsuit. (*Id.*)

On November 12, 1999, the EED informed Dennis that there was no basis to substantiate his allegations of racial harassment or race discrimination, that Dennis was replaced because he did not have a bus license, and that the officer selected to replace Dennis was also African-American and

possessed a bus license. (*Id.*, at ¶ 34). The EED also found that Dennis was not deprived of any benefit, as Dennis' drive to EJSP from Marlboro Camp was completed during a paid shift, and actually put Dennis closer to home at the end of his shift. (*Id.*)

(c) *Sergeant Tartza's Alleged Hanging Up on Dennis' Wife.*

Dennis' third EED complaint, filed on or about April 17, 1999, pertains to an incident occurring at the Marlboro Camp while Dennis was working at the camp's registration area. (*Id.*, at ¶ 35). On that date, Dennis claims that Officer Rollo informed him that he had received a telephone call from his wife. (*Id.*) When Dennis picked up the phone, the line went dead. (*Id.*) Dennis claims that Sgt. Tartza, who was also present at the camp center, hung up the phone on his wife. (*Id.*) Dennis asserts that his wife told him that while she was holding for Dennis, someone picked up the phone and said "send a telegram" and hung up on her. (*Id.*).

Dennis alleges that this incident was the product of racial harassment, discrimination, and retaliation because of his pending litigation. On October 7, 1999, the EED issued a findings letter, stating that there existed no probable cause to substantiate Dennis' allegations of. (*Id.*, at ¶ 36). Specifically the EED found that there was no actual evidence that Sgt. Tartza ever spoke with, or hung up the phone on Dennis' wife. (*Id.* at ¶ 37).

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(d) ***Dennis' Alleged Restricted Access to the EJSP Main Facility.***

Dennis' fourth EED complaint was filed on or around April 18, 1999. (*Id.*, at 38). Dennis contends that he was informed by a civilian operations worker (responsible for passing out assignments) that subsequent to the Godown incident on March 19, 1999, Dennis was banned from working the EJSP main institution, and was only allowed to work the administrative segregation unit, or Marlboro Camp. (*Id.*) Dennis blames his ban from EJSP on racial harassment, discrimination, and retaliation because of his lawsuit. (*Id.*).

On October 13, 1999, the EED issued a findings letter, dismissing Dennis' complaint for want of probable cause. (*Id.*, at ¶ 41). The EED explained that Dennis had not been restricted from entry into the main EJSP institution, but had merely been reassigned for the purpose of temporarily[2] separating him and Officer Godown. (*Id.*) The EED also explained that neither Officer Godown nor Dennis were at that time, permitted to work in the EJSP main facility. (*Id.*, at ¶ 39). The EED thus concluded that this temporary restriction was for legitimate purposes, and was not evidence of racial discrimination, harassment or retaliation for filing his lawsuit. (*Id.*)

(e) ***Officer Meretz's Alleged Threat to Dennis.***

The fifth EED complaint filed by Dennis, dated June 1, 1999, described an incident that occurred on May 20, 1999.

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2. Shortly thereafter, Dennis' restriction was removed. (Def. SOMF, at ¶ 40).

(*Id.* at ¶ 43). On that date, Dennis alleged that he was spoken to by Officer Robert Meretz in a very menacing, threatening, intimidating manner, who stated that he saw Dennis on Court TV[3], and that Meretz would "see [him] later." (*Id.*, at 42). Maretz denied ever having made any such comment, and Sergeant Kenneth Nelson, who Dennis listed as a witness to the incident, denied hearing said comment. (*Id.*, at ¶¶ 43-44). By letter dated December 3, 1999, the EED informed Dennis that it found his allegations against Meretz to be unsubstantiated, and even if true, the statement did not constitute discrimination, harassment or retaliation. (*Id.*, at ¶ 45).

(f) *The Sale of the Maggi T-Shirts.*

Dennis' sixth complaint, also dated June 1, 1999, referred to another incident on May 20, 1999. (*Id.*, at ¶ 46). On said date, Dennis stated that Sergeant Bonamo, Investigator W. Everett, and another individual were selling t-shirts with Maggi's picture and the wording "support our fearless leader" on EJSP property. (*Id.*)

Dennis alleged that the shirts were sold to raise money for Maggi's "legal defense fund", and to help cover Maggi's costs accruing from the suit filed by Dennis. (*Id.*) On May 20, 1999, Dennis and Leak also filed internal DOC reports stating that the selling of said t-shirts made them fearful for their safety. (*Id.*) In his EED Complaint, Dennis asserted

3. This referred to Dennis' and Leak's appearance on Court TV's *Johnnie Cochran* Show during which they publicly detailed their allegations of harassment, racism, and retaliation. (Def. SOMF, at ¶ 77).

that he approached Associate Administrator Terrance Moore about the t-shirt sales, and that Moore appeared unsympathetic. (*Id.*)

In response, Moore stated that he called Bonamo, and ordered him to cease any t-shirt sales on EJSP property. (*Id.*, at ¶ 47). Bonamo also claimed that he was selling the t-shirts to raise money for Maggi's retirement party, and that he had previously sold t-shirts in the same manner and for similar purposes. (*Id.*) Bonamo also stated that he ceased selling t-shirts when told by Moore. (*Id.*)

By letter dated November 5, 1999, the EED informed Dennis that although Bonamo sold t-shirts on State property (which was prohibited), there was insufficient evidence that the sale of the Maggi t-shirts constituted racial discrimination, harassment or retaliation against Dennis. (*Id.*, at ¶¶ 47-49). As a consequence of Dennis and Leak's concerns for their safety, the DOC followed the EED's recommendations and transferred Dennis to Northern State Prison, and Leak to Mountainview Youth Correctional Facility until further notice. (*Id.*, at ¶ 50). Both Dennis and Leak claim that this reassignment was retaliatory, harassing, and indicative of further race discrimination.

(g) ***EED Investigator's Alleged Failure to Properly Investigate Dennis' Claim, and Her Alleged Focus on Dennis and Leak's TV Appearance.***

Dennis' seventh and last EED complaint, also filed on June I, 1999, referred to a discussion that he and Leak had with EED Investigator Cherry Davis regarding their

complaints of the t-shirt sales of May 20, 1999. (*Id.*, at ¶ 51). Dennis alleges that Investigator Davis was less concerned with Dennis' allegations, and more concerned with Plaintiffs' TV appearance. (*Id.*)

By letter dated July 19, 1999, the EED informed Dennis that it dismissed his claim against Davis for want of probable cause (*Id.* at ¶ 52). The EED noted that Davis, a black female, had a legitimate business reason to pose questions about the fact that Dennis appeared on Court TV because it was against DOC policy to speak to the media regarding DOC matters. (*Id.*) The EED found that Dennis' complaint merely expressed dissatisfaction with the manner in which Investigator Davis conducted the administrative investigation, and that it did not state a claim of race discrimination, harassment, and retaliation for filing the lawsuit. (*Id.*)

3. Plaintiff Tyrone Leak's Race Discrimination, Harassment, and Retaliation Claims.

During all times relevant to this litigation, Leak filed a total of three (3) complaints with the EED. (Def. SOMF, at ¶ 56). It is also undisputed that Leak did not lose any compensation or benefits as a result of the alleged acts and/or complaints.

(a) Leak's Alleged 'Set-Up' and Discipline by Defendants.

Plaintiff Tyrone Leak's first EED complaint was filed on March 26, 1999. (*Id.*) In his complaint, Leak stated that he was being set up for discipline by Defendants because

two cameras that were intended for monitoring the prisoner population were instead fixed on Leak's post at the mess hail observation cage. (*Id.*; P1. SOMF, at ¶ 57). As a result, Leak alleges that Lieutenants Robert Miller, Frank Passucci, and Al Harris monitored him when he was unwell, and improperly accused him of sleeping on the job, and for wedging a key under the door. (*Id.*)

Lt. Passucci stated that while he was on duty, he noticed on one of the cameras that Leak was inattentive and slumped over in his chair. (Def. SOMF, at ¶ 57). Passucci then directed Lt. Harris and Miller to check on Leak. (*Id.*) Lt. Harris and Miller stated that when they went to Leak's post, they were unable to unlock the observation cage because the keys to the cage had been placed under the door which prevented the door from being opened fully. (*Id.*) Lt. Harris and Miller also stated that when Leak opened the cage door, his eyes were red and puffy. (*Id.*) As a result of the incident, Leak was relieved of duty from that post, charged with the offense of loss or careless control of keys, and given an official written reprimand after a hearing. (*Id.*) Leak claimed that Defendants' monitoring of his behavior was a retaliatory action in response to his litigation. (*Id.*) On September 29, 1999, the EED issued a findings letter stating that Leak's complaint was dismissed because there was no probable cause for race discrimination, harassment or retaliation. (*Id.*, at ¶ 61).

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(b) Leak's Discipline For Allegedly Making Chicken Noises At Sgt. Pasucci.

Leak's second EED complaint stemmed from an incident occurring on April 24,1999 against Sergeant Passucci, who had written him up on three prior occasions. (*Id.* at ¶ 62). Leak alleged that Passucci improperly reassigned Leak to another post. *Id.* Passucci claimed that Leak made chicken noises directed at Passucci as he walked by Leak. (*Id.*, at ¶ 63). When Passucci ordered Leak to stop, Leak stated that he had the right to make such noises, and started making more chicken sounds. (*Id.*) Passucci then reassigned Leak to another post. (*Id.*) Pascucci claimed that Leak's reassignment was warranted, and that Leak was attempting to provoke an incident to further his lawsuit. (*Id.*)

The EED issued a findings letter on September 24, 1999, stating that there was no probable cause for a claim of race discrimination, harassment and retaliation. (*Id.* at ¶ 65). The EED further found that Leak ignored Passucci, a superior officer's order, and that Leak was properly removed from his post. (*Id.*) Leak was also issued a written reprimand for having disregarded Passucci's April 24, 1999 order to cease making chicken sounds. (*Id.* at ¶ 66).

(c) Sgt. Cifelli's Alleged Threat to Leak.

Leak filed his third and last EED complaint against Sergeant Joseph Cifelli on September 8, 1999. (Def. Ex. 37). Leak alleged that Cifelli, while off-duty in his neighborhood, stated to others that "he wanted to put cement shoes" on Leak. (*Id.*, at ¶ 67). Leak also filed a private citizen complaint in

the Municipal Court of Edison Township, citing Cifelli with violating N.J.S.A. 2C:12-3a. (*Id.*) This charge was dismissed by the Edison Municipal Court. (*Id.*) After the charges against Cifelli had been dismissed, the EED closed its investigation on Leak's complaint. (*Id.*)

(d) Defendants' Alleged Termination of Leak.

Lastly, Leak went on unrelated medical leave in May 1999, and his approved leave ended on October 12, 1999. (*Id.*) When Leak did not report back to work, Defendants filed disciplinary charges against him. (*Id.*) Leak alleges that even though he applied for a medical disability pension on November 24, 1999, he asserts that Defendants refused to adjourn their disciplinary hearing, and determined that Leak had resigned not in good standing. (*Id.*; Although Leak and the DOC settled this dispute, and he was allowed to resign in good standing, Leak alleges that the disciplinary charges and termination was the product of discrimination, harassment, and retaliation for filing the lawsuit. (Pl. SOMF, at ¶ 69).

4. Dennis and Leak's Complaints Regarding Officer Lineups, and Verbal and Physical Abuse of Black Inmates.

In addition to their race discrimination, hostile work environment and retaliation claims, Dennis and Leak both make allegations that although no EED complaint was ever filed, there was a period during which: white officers and black officers lined up separately during daily officer lineups; white officers routinely called black inmates racially

derogatory names; and white officers were physically abusing and using excessive force on black inmates. (Def. SOMF, at ¶ 54, ¶ 69). Neither Dennis nor Leak complained about the alleged segregation and abuse.

ANALYSIS

I. The Summary Judgment Standard

A motion for summary judgment requires the court to consider whether the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Only facts that may affect the outcome of a case under applicable law are "material." "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.*

All reasonable inferences from the record must be drawn in favor of the non-movant. *Id.* at 255. Although the movant has the initial burden of demonstrating an absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. *See J.F. Feeser, Inc. v. Serv-A-Portion,* 909 F.2d 1524, 1531 (3d Cir. 1990), *cert. denied,* 499 U.S. 921 (1991) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)).

Appendix C

II. Dennis and Leak's Hostile Work Environment Claims Arising from the Racially Offensive Materials Photographed in Maggi's Office Are Dismissed As Neither Plaintiff Has Directly Contested Defendants' Assertions that the Racially Offensive Materials Were Planted and/or Arranged by Leak.

In reviewing the record, this Court finds that the objects that were part of the racially offensive arrangement in Maggi's Office, the hat, the doll, and the coffin were, indisputably, gifts from minority officers to Chief Maggi. (Stip. Facts – Leak & Dennis, at ¶ 7). Specifically, the hat was a gift by Sergeant Francisco Gutierrez, the voodoo doll was a gift by Lieutenant Brenda Brown, and the coffin was a gift by an inmate Steven Dean. (Def. SOMF, at ¶ 70). This Court finds nothing inherently offensive about these items.

However, the arrangement of these items together, with the additional placement of a hair braid, and a sign proclaiming "No Niggers Allowed" is racist in every reasonable definition. This Court therefore, focuses on whether Maggi's office walls actually adorned the above debasement, or whether the racist arrangement was created in order to further the merits of the herein action.

Defendants assert that the hat and coffin were affixed to Maggi's office wall, but that the doll was never on the wall next to the hat or coffin, as portrayed in the photographs. (*Id.*, at ¶ 73). Defendants specifically accuse Leak of taking advantage of Maggi's open office, and claim that Leak

himself moved the doll to the wall (with the hat and coffin), and added the hair braid, and the racially offensive sign so as to make the arrangement racially offensive. (*Id.*)

Defendants present clear deposition testimony by Corrections Officers which heavily supports Leak's fabrication of the racially offensive arrangement. Officer Victor T. Moore unambiguously testified that he watched Leak create the racially offensive sign and later attach it to the wall. (Moore 5/8/01 Dep., at 71:7-11; 84:15-24). Officer Barry Jackson also clearly testified that after being brought into Maggi's office by Leak, he watched Leak arrange the hat, coffin, doll, and a braid of hair against the wall, after which Leak produced the racially offensive sign from his pocket and affixed it nearby to the items he had just arranged. (Jackson 11/13/02 Dep., at 20:23-24; 21:4-12, 16-21; 43:8-44:11) Furthermore, Jackson testified that Leak told him that he intended to bring the photograph to a lawyer to file a "million dollar lawsuit." (*Id.* at 10:12-14; 21:19-21) Jackson and Moore, both African-American, did not perceive the coffin, doll and hat as offensive. (Jackson 11/13/02 Dep., at 36:3-7; Moore 5/8/01 Dep., at 73:1-25).

Dennis states that he was with Leak on approximately three occasions when photographs of the racially offensive sign/arrangement were taken. (Dennis 3/4/03 Dep., at 189:7-191:6; 199:3-12). Dennis asserts that he did not see Leak put up or remove the racially offensive sign/arrangement on Maggi's wall. (*Id.*) Dennis also states that he has seen the racially offensive sign on Maggi's wall on "numerous occasions." (*Id.*, at 192:8-9). However, at his deposition, Dennis could not name one officer (other than Leak) who

had specifically seen the racist sign/arrangement, as portrayed in the Leak photographs. (*Id.*, at 195:20-196:13). Interestingly, no other officers, including twelve of the fifteen plaintiffs seeking compensation in this very action, have ever claimed seeing the racially offensive sign or arrangement. (West 2/26/04 Mem. To Court, at p.2).

This Court also finds notable that even though Dennis and Leak witnessed the racist sign and arrangement in Maggi's office in 1997, neither approached the EED, or any other superior at the DOC with complaints about it. (Stip. Facts – Dennis & Leak, at ¶ 5). This Court is also disturbed by the fact that Plaintiffs' counsel refused to allow Leak to provide a writing sample to Defendants for handwriting analysis, especially when Leak faces allegations from fellow officers that he wrote the racist sign himself. (Leak 7/31/01 Dep., at 106:11-18).

In order to defeat Summary Judgment, Dennis or Leak must demonstrate that: (i) they suffered intentional discrimination because of race; (ii) the discrimination suffered was severe or pervasive; (iii) the discrimination detrimentally affected them; (iv) the discrimination suffered by them would detrimentally affect a reasonable person of the same race in that position. *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1482 (3d Cir. 1990). In addition, Dennis and Leak must demonstrate the existence of *respondeat superior* liability in order to hold the State Defendants' liable for any such discriminatory acts. *Id.*

In their opposing brief, Dennis and Leak merely submit that "whether [they] hung the sign up themselves requires a

credibility determination, and such determinations shall be made by a jury." (Pl. Opp. Br., at p. 11). Painfully devoid from Plaintiffs' submissions are sworn Certifications or Affidavits by Leak and Dennis which directly rebut the testimony of Officers Jackson and Moore. In a case as racially charged as the present one, this Court is extremely troubled that neither Leak (nor Dennis) has come forward to sharply contest Jackson and Moore's claims that Leak fabricated the photographed scene. This Court need not submit this matter to a jury when Leak and Dennis have failed to credibly contest Defendants' overt accusations of fraud. Accordingly, this Court rules that neither Dennis nor Leak have established a hostile work environment claim arising from the racially offensive materials photographed in Maggi's office. Any Title VII, NJLAD, or § 1981 claims based on the above racially offensive items are therefore dismissed.

III. Dennis and Leak's Retaliation and Discrimination Claims Under Title VII, and NJLAD Are Dismissed.

It is well-settled that Dennis and Leak's claims under Title VII and NJLAD should be analyzed under the evidentiary framework[4], as set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *See Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3rd Cir.1997); *See also Erickson v. Marsh & McLennan Co., Inc.*, 117 N.J. 539, 549 (1990). It is also

4. The Court need not define and discuss the *McDonnell-Douglas* evidentiary framework as this Court has ruled that Dennis and Leak fail to meet the *prima facie* elements of their discrimination and retaliation claims.

well settled that the *prima facie* elements of Dennis and Leak's discrimination and retaliation claims are similar under Title VII and the NJLAD. *Id.*

To establish *a prima facie* case of racial discrimination in the disciplinary context, Dennis and Leak must establish that they: (1) are members of a protected class; (2) suffered an adverse employment action; and (3) either non-members of the protected class were treated more favorably than Plaintiffs, or the circumstances of Plaintiffs' adverse employment action give rise to an inference of race discrimination[5]. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981). For purposes of this motion, this Court assumes, and neither party should deny that Dennis and Leak are members of a protected class.

In addition, to establish *a prima facie* case of retaliation, Dennis and Leak must show that they, more likely than not: (1) Engaged in protected employee activity; (2) Suffered adverse employment action by Defendants either after or contemporaneous with their protected activity; and (3) There is a causal connection between the Dennis and Leak's protected activity and the Defendants' adverse employment action. *Woodson v. Scott Paper Co.,* 109 F.3d 913, 920 (3d Cir. 1997); *Quiroga v. Hasbro. Inc.,* 934 F.2d 497, 501 (3d

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5. Although the *McDonnell Douglas Corp. v. Green* framework is often scrutinized in a failure-to-hire or wrongful discharge context, the Supreme Court in that case noted that: (t)he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations. 411 U.S. 792, 802 n.13 (1973).

Cir. 1991); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989); *Foster v. Twp. Of Hillside*, 780 F. Supp. 1026, 1041 (D.N.J. 1992). Also, for purposes of this motion, this Court assumes that Dennis and Leak engaged in protected employee activity when they complained to the EED, and filed their lawsuit with this Court. This Court rules that Dennis and Leak's discrimination and retaliation claims must be dismissed because they lack one common and necessary element: Neither has suffered a cognizable adverse employment action.

Weston v. Commonwealth of Pennsylvania supports this Court's ruling that employment actions taken against Dennis and Leak did not constitute an adverse employment action, or a material change in the terms and conditions of their employment. 251 F.3d 420, 431 (3d Cir. 2001). In *Weston*, the Third Circuit reasoned that the employer's reprimands against Weston did not materially alter his terms and conditions because: he was not demoted in title or reassigned to a different position or location; he did not have his hours or work changed or altered in any way; and because he was not denied any pay raise or promotion as a result of these reprimands. *Id.*

Specifically, this Court finds that Dennis was never terminated, demoted, or subjected to any change in the terms of his employment when he was: (1) directed to write a report on an incident he witnessed between two officers; (2) called to report to a location where he could not be utilized; (3) allegedly told by his wife that someone at his workplace hung up the phone on her, (4) allegedly told by a colleague, Officer Meretz in a threatening tone that he would "see him

later"; (5) witness to t-shirts sales for Chief Maggi's alleged "legal defense fund"; (6) questioned by EED Investigator Davis about an unauthorized TV appearance; and (7) temporarily assigned to a post outside of the EJSP main facility when he and Officer Godown were involved in a verbal dispute. As appropriately explained by Defendants, "every action that an irritable, chip-on-the-shoulder employee did not like" should not form the basis for a retaliation claim. *Robinson v. City of Pittsburgh,* 120 F.3d 1286, 1300 (3d Cir. 1997) (Internal citations omitted).

Likewise, this Court finds that Leak was also not subject to an adverse employment action when he was: (1) given a reprimand for sleeping on the job; (2) reassigned to a different post for making chicken noises at Officer Passucci; and (3) apprised that Officer Cifelli made threats to Leak. This Court further finds that Leak was properly disciplined for his failure to be vigilant on his job, and properly reassigned for what can only be characterized as immature conduct towards a superior officer. Also, this Court has no independent proof of Officer Cifelli's threats, and concludes that the EED properly closed its file on said matter.

In addition, this Court is not swayed by Leak's argument that he was terminated from his post in retaliation for his EED complaints and his lawsuit against Defendants. (Pl. Opp. Br., at p. 31). Leak was terminated because he was absent from employment for eight (8) months and exceeded his available leave time. In any event, it is undisputable that Leak subsequently reached a settlement agreement with Defendants, whereby the DOC changed Leak's file status from "terminated" to "resigned in good standing", and Leak agreed to waive any claims of wrongful termination.

Similarly, this Court is not convinced that Dennis and Leak were involuntarily transferred on May 24, 1999, as they claim. (Pl. Opp. Br., at p. 31). Dennis and Leak's immediate "involuntary transfers" from EJSP in May 1999 were precipitated by their very complaints of feeling unsafe at EJSP, and again, neither Plaintiff suffered a loss of rank or compensation. Any procedural anomalies claimed by Dennis and Leak are not indicative of race-based discrimination, harassment or retaliation. Lastly, this Court finds any claims made by Dennis and Leak regarding race segregation in officer line-ups, abuse against black inmates to be without basis. Neither Plaintiff submits particulars as to any said incidents, and it is telling that neither Dennis nor Leak ever filed a complaint with Defendants about said practices even though they allege that they were deeply troubled with said acts.

Consequently, this Court rules that neither Dennis nor Leak have met their *prima facie* requirements for bringing their race-based discrimination and retaliation claims and therefore, dismisses any remaining Title VII, and NJLAD claims.

IV. Dennis and Leak's §§ 1983, 1985, and 1988 Claims Are Dismissed.

It is also without legal dispute that the standards for Dennis and Leak's § 1983 and New Jersey constitutional claims (of employment discrimination) utilize the same standards applied to NJLAD and Title VII employment discrimination claims. *See Murphy v. Housing Authority and Urban Redevelopment,* 32 F.Supp.2d 753, 763 (D.N.J.,1999).

As such, Dennis and Leak's failure to meet the *prima facie* burden of their discrimination and retaliation claims under Title VII and NJLAD undoubtedly disposes of any claims brought under the U.S. and New Jersey Constitutions.

V. Dennis and Leak's Tort, CEPA, and Public Policy Claims Are Also Dismissed.

Dennis and Leak's tort claims of intentional and negligent infliction of emotional distress claims are largely buttressed by the "shock value" of the racially offensive arrangement photographed in Chief Maggi's office. As this Court has previously stated that Defendants are not responsible for the placement of the racially offensive arrangement in Chief Maggi's office, Dennis and Leak's tort claims fail as well.

Finally, CEPA was designed to prohibit retaliatory action by an employer against an employee who discloses or threatens to disclose an employer's illegal activities, testifies before a public body regarding an employer's violation of a law, or refuses to participate in an employer's activity which the employee believes is illegal or in contravention of public health, safety or welfare. *Young v. Schering Corp.*, 275 N.J.Super. 221, 233-34 (App. Div. 1994). As this Court has already ruled, Defendants did not retaliate against Dennis and Leak for any protected activity. Accordingly, this Court first dismisses Dennis and Leak's CEPA claims.

Also, N.J.S.A. 34:19-8, the waiver provision of CEPA, provides that the institution of a CEPA action against Defendants shall be deemed a waiver of the rights and

remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law. *Id.* As Dennis and Leak's public policy claims are at best, related to Plaintiffs' CEPA claim; they are precluded by the waiver provisions of N.J.S.A. 34:19-8, and must be dismissed.

CONCLUSION

Accordingly, Defendants, State of New Jersey, New Jersey Department of Corrections, Jack Terhune, Commissioner of the New Jersey Department of Corrections, Steven Pinchak, Administrator of the East Jersey State Prison, Patrick Arvonio, and Steven Maggi, Chief of Correctional Officers East Jersey State Prison's Motion for Summary Judgment is **GRANTED**. Plaintiffs' Dennis and Leak's Complaint is accordingly **DISMISSED WITH PREJUDICE** in its entirety. An appropriate form of Order accompanies this Opinion.

s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

cc: The Honorable Ronald J. Hedges, U.S.M